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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION 3

THE PEOPLE,

Plaintiff and Respondent,

v.

NATHAN HYDE TAYLOR,

Defendant and Appellant.

A125506

(Sonoma County
Super. Ct. No. SCR541285)

After entering his guilty plea to a single felony count of possession of a billy, Nathan Hyde Taylor filed a motion inviting the trial judge to exercise his discretion to dismiss a prior felony strike conviction. Taylor claims that his case is outside the spirit of the Three Strikes law because he is a drug addict whose only prior felony was over twenty years old. It was therefore in the interest of justice for the court to dismiss the prior strike. He argues that he should have been placed on probation so he could receive residential treatment for his addiction. The trial judge disagreed. Taylor was sentenced to the mid term of two years that was doubled due to his prior felony conviction, for a four year total aggregate prison term.¹ Taylor appeals based on his contention that the trial judge abused his discretion by not dismissing the prior strike. We disagree and affirm.

¹ Penal Code 1170.12, subdivision (c)(1), states that, "If a defendant has one prior felony conviction that has been pled and proved, the determinate term . . . shall be twice the term otherwise provided as punishment for the current felony conviction."

FACTUAL AND PROCEDURAL BACKGROUND

On July 2, 2008, Taylor and his girlfriend were drinking at her house when they got into a fight and she asked him to leave. Taylor recognized that he was not in a condition to drive his car, so instead, he decided to wait it out on his girlfriend's front porch. Someone in the neighborhood saw Taylor and reported an unwanted subject to the police. When the police arrived, Taylor was sitting on the ground in front of the house and smelled of alcohol.

Because Taylor was on active probation, the police did a probation search of his car. Inside the police found a baseball bat wrapped in wire with metal staples and a lead weight affixed to the end of the bat. The police also found a spring-loaded switchblade knife under the dashboard of the car. On the back seat police found a fanny pack containing 13 hypodermic needles, two prescription pill bottles, four metal spoons, a dental scraper, and a glass pipe of the type commonly used to smoke methamphetamine. One of the hypodermic needles had a liquid substance inside. It was later tested and found to be methamphetamine.

Taylor tried to explain to police that the baseball bat wrapped in wire was not an illegal billy. He told police that for the past 14 years he had been a freelance airbrush artist and his airbrushing business had a monster theme. The baseball bat was a prop for a Genghis Khan type character and Taylor said it was in his car because he was in the process of moving items from his shop.

Taylor was arrested and charged with five counts. Count I alleged violation of Penal Code section 12020, subdivision (a)(1), a felony, for possession of a weapon commonly known as a billy. Count II alleged violation of Health & Safety Code section 11377, subdivision (a), a felony, for unlawfully possessing methamphetamine. Count III alleged violation of Penal Code section 653k, a misdemeanor, for possessing a switchblade knife. Count IV alleged violation of Health & Safety Code section 11364, subdivision (a), a misdemeanor, for possessing drug paraphernalia used for smoking a controlled substance, and in count V for violation of Business & Professions Code section 4140, a misdemeanor, for the possession of a hypodermic needle and syringe. It

was also alleged that Taylor had a prior strike conviction of a serious or violent felony in 1989 for burglary in violation of Penal Code section 459.

When the case was set for trial, Taylor decided to take the District Attorney's offer and plead guilty to count I, possession of a billy, and admit the prior felony strike conviction for first degree residential burglary in return for dismissal of the remaining counts.

In addition to the prior felony, Taylor's criminal record included eight misdemeanors spread over twenty-plus years for reckless driving, violation of a restraining order, possession of methamphetamine, possession of a switchblade knife, and two convictions each for driving on a suspended license and driving under the influence. As a result of these convictions, Taylor had served numerous conditional sentences for those offenses with mixed success. While this case was pending in the trial court, Taylor also had three misdemeanors pending for a violation of probation, domestic violence, and petty theft.

Prior to sentencing Taylor filed a Statement of Mitigation and Invitation for the Court to Exercise Its Discretion to Dismiss the Prior felony strike conviction. Taylor claimed his case was outside the spirit of the Three Strikes law for two reasons: (1) Taylor's prior strike occurred in 1989 when he was 19 years old and, although technically a felony residential burglary, it involved a residence in which Taylor had been living and the theft of his roommate's stereo after the roommate/owner kicked Taylor out; (2) since the burglary conviction, Taylor's criminal history had been limited to misdemeanors motivated by drug and alcohol abuse, which established that his criminality was due to his drug problems and not a desire to victimize other people.

In ruling on Taylor's Invitation to Dismiss, the trial judge acknowledged his discretion to strike the prior conviction, but he considered Taylor to be a career criminal with a prior serious felony followed by multiple misdemeanor convictions. As such, Taylor's case was within both the letter and the spirit of the Three Strikes law. The trial judge declined to dismiss the prior felony.

Taylor was denied probation because the prior strike rendered him ineligible. He was committed to state prison for the recommended mid term of two years, doubled due to the prior strike, for a total aggregate term of four years, pursuant to Penal Code sections 667, subdivisions (b)-(i) or 1170.12 (two strikes). Taylor timely appealed.

DISCUSSION

A. Standard of Review

A trial court's decision to not dismiss a prior serious felony conviction under the Three Strikes law is reviewed under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 371.) To establish an abuse of discretion in a sentencing decision, the sentence must be shown to be “ ‘ “irrational or arbitrary.” ’ ” (*Id.* at p. 376.) Failing such a showing, the trial court's decision will not be reversed on review. (*Id.* at p. 377.) Reasonable people disagreeing about the trial judge's decision is not a sufficient basis to reverse that decision. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 978.) “ ‘ “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” [Citations.]’ ” (*Ibid.*, quoting *People v. Preyer* (1985) 164 Cal.App.3d 568, 573.)

In order to prevail in this appeal, Taylor must therefore show that (a) he in fact falls outside the spirit of the Three Strikes law and (b) the refusal to dismiss his prior strike conviction was “ ‘ “irrational or arbitrary.” ’ ”

B. California's Three Strikes Law

The “unambiguous purpose” of California's Three Strikes law “is to provide greater punishment for recidivists.” (*People v. Davis* (1997) 15 Cal.4th 1096, 1099.) Under the law, defendants who have been previously convicted of either a violent or serious felony, may get longer prison sentences than defendants who have no such prior convictions. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d).)

In considering whether a defendant falls outside the spirit of the Three Strikes law, the question is whether the defendant “should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*); Pen. Code, § 1385, subd. (a).) In considering

whether a defendant should be so treated, “the court in question must consider whether, in light of the nature and circumstances of [the defendant’s] present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part.” (*Williams* at p. 161.)

If a prior felony strike conviction is dismissed, “[the] sentencing court is concluding that an exception to the [Three Strikes] scheme should be made because . . . this defendant should be treated as though he actually fell outside the Three Strikes scheme.” (*People v. McGlothin* (1998) 67 Cal.App.4th 468, 474.) “Because the circumstances must be ‘extraordinary . . . by which a career criminal can be deemed to fall outside the spirit of the very scheme within which he squarely falls once he commits a strike as part of a long and continuous criminal record, the continuation of which the law was meant to attack’ [citation], the circumstances where no reasonable people could disagree that the criminal falls outside the spirit of the three strikes scheme must be even more extraordinary.” (*People v. Carmony*, *supra*, 33 Cal.4th at p. 378.)

Here, Taylor asserts, “the lower court ignored evidence submitted by [Taylor] on the relevant factors that it was required it [*sic*] to consider. The court did not consider the circumstances of [Taylor’s] current billy club possession offense. The court did not consider the nature and circumstances of [Taylor’s] one prior serious felony conviction And the court did not consider [Taylor’s] background, character and prospects. If the court had considered these relevant circumstances, it would have concluded that this is one of those rare cases where the defendant may be deemed to fall outside the spirit of the three strikes law.” The problem with Taylor’s argument is that there is nothing in the record that demonstrates the trial judge improperly failed to consider all the evidence, and absent such a showing there is no support for finding the refusal to dismiss Taylor’s prior felony strike conviction was an abuse of discretion. “[U]nless the record affirmatively indicates otherwise, the trial court is deemed to have considered all relevant criteria, including any mitigating factors.” (*People v. Holguin* (1989) 213 Cal.App.3d 1308, 1317-1318.)

Taylor also asserts that the trial court should have considered the nature of his possession of a billy, as a factor in mitigation because it is a wobbler that could have been prosecuted as a misdemeanor. Taylor's argument is problematic at best. There is nothing in the record that sheds any light on why this crime was prosecuted as a felony instead of a misdemeanor. No mention of the circumstances is made in Taylor's Statement of Mitigation. No mention of it was made during the oral argument on Taylor's motion to strike. Nothing regarding the fact that Taylor's felony could have been charged as a misdemeanor is mentioned in the transcript of Taylor's sentencing colloquy. Absent any explanation in the record, we will not speculate as to the reasoning or make presumptions about why this crime was charged as a felony or whether its wobbler status should be considered a mitigating factor. "As a general rule an appellate court will consider only such points as were raised in the trial court." (*Hennefer v. Butcher* (1986) 182 Cal.App.3d 492, 505.)

Taylor also contends that dismissing his prior strike would serve the interest of justice because it would afford Taylor the opportunity to treat his alcohol and substance abuse problem while on probation as he desires to do. Penal Code section 1385, subdivision (a), provides that when a trial court exercises its discretion about whether to dismiss a prior felony strike conviction, it may order it dismissed "in furtherance of justice." (Pen. Code, § 1385, subd. (a).) The overriding principle that has emerged from case law is that "furtherance of justice" requires " 'consideration both of the constitutional rights of the defendant, and *the interests of society represented by the People*, in determining whether there should be a dismissal.' " (*People v. Orin* (1975) 13 Cal.3d 937, 945.)

Taylor asserts that there is a high likelihood he would succeed if he were placed on probation because his past performance shows that he is capable of "conforming to society's norms" when he has effective treatment for his drug problem. Despite Taylor's assertion that his prospects for success on probation are positive, the record says otherwise. Taylor has served numerous conditional sentences with mixed success as evidenced by his twenty-plus years of recidivism. Given Taylor's history, the scale tips

in favor of the interests of society against dismissing Taylor's prior felony strike conviction. The interest of justice, consistent with the spirit of the Three Strikes law, requires that Taylor face the punishment that is a consequence of his on-going criminal behavior. (Pen. Code, § 1170.12, subd. (c).)

Taylor's willingness to address his drug and alcohol problem and his interest in enrolling in a residential drug treatment program are commendable. But we cannot overlook that during his twenty-plus years of trouble with the law, Taylor had ample opportunity to enroll in and successfully complete drug treatment on his own. He has, however, not done so. Moreover, being sent to prison does not preclude Taylor from addressing his drug and alcohol problem. If Taylor is serious about learning to control his drug and alcohol abuse, he will have an opportunity to do so in prison, and in fact it appears that while he was awaiting sentencing in the county jail he attended the in custody version of the residential program into which he wishes to be placed.

"[S]triking of a prior serious felony conviction . . . is an extraordinary exercise of discretion, and is very much like setting aside a judgment of conviction after trial." (*People v. Jackson* (1986) 178 Cal.App.3d 694, 697-698.) Therefore, the circumstances to which such action is applied must itself be extraordinary. (*People v. Strong* (2001) 87 Cal.App.4th 328, 332.) Taylor's situation, however, is far from extraordinary. Given his continuous criminal history and his mixed success on prior sentences, this is not a situation where the trial judge abused his discretion by denying Taylor's invitation to dismiss his prior strike. Instead, it is a situation where, at best, reasonable minds could differ as to what to do with a repeat offender with a drug problem.

DISPOSITION

The trial court's judgment is affirmed.

Siggins, J.

We concur:

McGuiness, P. J.

Jenkins, J.